Perez v Bellevue Hosp.
2018 NY Slip Op 33411(U)
December 24, 2018
Supreme Court, New York County
Docket Number: 159919/17
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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MADELINE PEREZ,

Petitioner,

-against-

BELLEVUE HOSPITAL and N.Y.C. HEALTH AND HOSPITAL CORPORATION,

Respondents.

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Index No.: 159919/17

Motion Seq. No.: 001

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In this personal injury action, petitioner Madeline Perez ("Petitioner") moves pursuant to General Municipal Law ("GML") § 50-e (5) ["Section 50-e (5)"] for leave to file a late notice of claim upon the respondent Bellevue Hospital and N.Y.C. Health and Hospital Corporation ("NYCH&H") (collectively "Respondents"), or to deem the Notice of Claim attached to the instant Petition as timely served *nunc pro tunc*. Respondents oppose the Petition.

BACKGROUND FACTS

Petitioner alleges that she was injured on December 26, 2016 (the "Incident") while working as a corrections officer for the New York City Department of Corrections (the "DOC") assigned to Bellevue Hospital, 19 South Medical Ward (the "Ward"). Petitioner claims that upon arriving at the Ward, she was told by an officer named Officer Martinez at about 11:30 a.m. that a certain prisoner known as Oshane Robertson (the "Inmate") was "highly violent and should have two Behavioral Health Aids ("BHAs") accompanying him at all times" (Petitioner's Affidavit, ¶ 5). Petitioner claims that after being told about the Inmate, she verified said information with the supervising nurse on that floor known as Catherine Palmer ("Palmer") who

confirmed that two BHAs should be present with the Inmate at all times. Palmer allegedly also told Petitioner that she had been contacting Palmer's supervisors since December 24, 2016 to request such BHAs but "nothing had been done about it" (*id.*, ¶ 6).

Petitioner claims that at approximately 3:40 p.m. on that day, she heard a nurse state that the Inmate was engaged in a physical assault with another inmate assigned to a room nearby to his own. Upon arriving to those rooms, she spoke with two inmates who accused the Inmate of assaulting one of them. Petitioner states that she then summoned Captain Gedeon Guerin and advised him that the Inmate required two BHAs and that Palmer had told her about the unsuccessful attempts to obtain said BHAs for the Inmate.

Petitioner claims that as she was speaking to the inmates about what occurred, she was assaulted by the subject Inmate for a few minutes, and as a result was transported by wheel chair to the emergency room at Bellevue Hospital. Petitioner claims she suffered lip and facial contusions and injuries to her right and left shoulders, neck, lower back, right elbow, right wrist and hand and both knees. Petitioner states that the next day she was referred to an orthopedist who performed total knee replacement surgery on August 1, 2017.

Petitioner maintains that she began to think of commencing a law suit after undergoing knee replacement surgery in August 2017, and first consulted an attorney in late October 2017 who informed her about the requirement to file a Notice of Claim. Petitioner asserts a claim against Respondents for negligent supervision (Petition, Exhibit "A" [proposed Notice of Claim]; Tr Oral Argument, at 5).

In support of her Order to Show Cause, Petitioner attaches a proposed Notice of Claim [Exhibit "A"] and her Affidavit [Exhibit "B"]. Petitioner fails to provide any other evidence of

the alleged Incident.

DISCUSSION

Notice of Claim

Pursuant to GML § 50–e (1) (a), a party seeking to sue a public corporation must serve a notice of claim on the prospective respondent "within ninety days after the claim arises" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016]; *see Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d 672, 674 [2016]; *Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d 401, 402 [1st Dept 2018]. The instant proceeding for leave to serve a late notice of claim was commenced on or about November 9, 2017, over ten months after the alleged Incident occurred (December 26, 2016) and over seven months, after the 90-day notice of claim period expired (on or about March 26, 2017).

GML Section 50-e (5) which governs applications to file a late notice of claim, permits a court in its discretion to extend the time for a petitioner to serve a notice of claim. Under that section, a court is required to consider factors, including as is pertinent here, "whether there was (1) a reasonable excuse for the delay [in service], (2) actual knowledge on the part of [the respondent] of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter, and (3) substantial prejudice to [the respondent] due to the delay" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 463).

"The lower courts have broad discretion to evaluate the factors set forth in General Municipal Law § 50-e (5). At the same time, a lower court's determinations must be supported by record evidence" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 465 [internal citations omitted]). "[W]hile the presence or the absence of any one of the factors is not

necessarily determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance" (*Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d at 402 [internal quotation marks and citation omitted]).

It is well established that "the absence of a reasonable excuse is not, standing alone, fatal to [an] application" to file a late notice of claim (*Matter of Richardson v New York City Hous. Auth.*, 136 AD3d 484, 485 [1st Dept 2016] [internal quotation marks and citation omitted]). The actual knowledge requirement of Section 50-e (5) "'contemplates 'actual knowledge of the essential facts constituting the claim,' not knowledge of a specific legal theory" (*Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d at 677 *quoting Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *see Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d at 403).

Regarding the prejudice showing required under Section 50-e (5), a petitioner must "make an initial showing that the public corporation will not be substantially prejudiced and then [t]he public corporation [must] rebut that showing with particularized evidence" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 467).

Reasonable Excuse

Petitioner fails to offer a reasonable excuse for the delay in moving to serve a late Notice of Claim. Petitioner claims merely that she had "no idea" about the requirement to file a Notice of Claim believing that she could file a claim against Bellevue Hospital at a later time (Petitioner's Affidavit, ¶ 12; Tr Oral Argument at 3-5). It is well settled that "ignorance of the law is not a reasonable excuse" (*Basualdo v Guzman*, 110 AD3d 610, 610 [1st Dept 2013]). In addition, although Petitioner claims that she first began to think about bringing a law suit after

completing knee replacement surgery on August 1, 2017, she did not consult with her "current attorney" until late October 2017 (*id.*). Petitioner offers no excuse as to why she failed to file a petition for leave to file a late notice of claim in the interval between August 2017 and November 2017. However, given that failure to offer a reasonable excuse is not fatal to an application to file a late Notice of Claim, the other factors set forth in Section 50-e (5) must be considered (*Matter of Richardson v New York City Hous. Auth.*, 136 AD3d at 485).

Actual Knowledge

"The actual knowledge requirement contemplates actual knowledge of the essential facts constituting the claim not knowledge of a specific legal theory" (*Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d at 403 [internal quotation marks and citations omitted]). "[K]nowledge of the facts underlying an occurrence does not constitute knowledge of the claim" (*Matter of Schifano v City of New York*, 6 AD3d 259, 260 [1st Dept 2004] [internal quotation marks and citation omitted). "[K]nowledge that [plaintiff] was allegedly injured does not establish actual notice of her claim that defendants were negligent" (*Ifejika-Obukwelu v New York City Dept. of Educ.*, 47 AD3d 447, 447 [1st Dept 2008]).

Petitioner maintains that Respondents had actual notice of the essential facts constituting her claim based on her admission to the emergency room of Bellevue Hospital on the date of the Incident where she informed emergency room personnel of the alleged assault and that BHAs were not present. Furthermore, Petitioner claims that Respondents had actual knowledge because Petitioner's employer, the DOC, had undertaken an investigation and conferred with personnel from Bellevue Hospital about the Incident.

Bellevue Hospital Medical Records

It is well settled that a medical provider's mere possession or creation of medical records does not establish that it had "actual knowledge of a potential injury where the records do not *evince* that the medical staff, by its acts or omissions, inflicted any injury on plaintiff"" (*Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d at 677 *quoting Williams v Nassau County Med. Ctr.*, 6 NY3d at 537; *see Hudson v Patel*, 146 AD3d 758, 759-760 [2d Dept 2017]).

Here, there is no evidence in the medical records submitted by Respondents[1], that Petitioner informed anyone in the Bellevue Hospital emergency department of her claim that two BHAs should have been assigned to the Inmate. The medical records merely indicate that Petitioner's chief complaint was that she was "hurt on the job, hit to head by inmate with abrasion to left cheek" (Affirmation in Opposition, Exhibit"A" at 1). Contrary to Petitioner's claims, the records fail to provide any facts indicating that the Inmate was previously recognized as violent, was inadequately supervised, that BHAs were not present as required or that Respondents acted negligently in any way.[2] In addition, Petitioner claims that she verified the information about the required supervision of the Inmate by BHAs with Palmer, the purported supervising nurse on the subject Ward of Bellevue Hospital where the Inmate was admitted.

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[1]Although Petitioner argues Respondents had actual knowledge of her claim based on the Bellevue emergency department medical records, she fails to attach such records to her Petition.

[2]The medical records state that Petitioner was "assaulted by a prisoner during work today" and "patient was punched in the head several times and [h]ead hit door" (Respondents' Affirmation in Opposition, Exhibit "A" at 3-4). Upon medical examination, the emergency room physicians determined there was no need for imaging.

However, Respondents submit an Affidavit from the Director of Human Resources at Bellevue Hospital Center who confirms that a nurse named "Catherine Palmer" is not currently employed and has never been employed at Bellevue Hospital (*id.*, Exhibit "B").

Incident Report

Petitioner argues that her employer, the DOC, had undertaken an investigation and conferred with hospital personnel about the Incident, and as such, Respondents had actual notice of the facts constituting her claim. It is unrefuted that Petitioner was employed by the DOC, which is an entirely different agency than NYCH&H with separate employees from NYCH&H. Petitioner does not claim nor is there any evidence that Respondents conducted an investigation of the Incident or that any employees of Respondents observed the Incident. According to an Affidavit of the Associate Executive Director of Risk Management at Bellevue Hospital Center, there were no investigation reports in the possession of the hospital pertaining to the Incident involving Petitioner and a patient/inmate on the subject hospital Ward (Affirmation in Opposition, Exhibit "C").

Records from the DOC would not constitute knowledge to the Respondents. Even if the DOC records gave sufficient notice of Petitioner's claims, there is no evidence that Respondents are alter egos of DOC and that notice to DOC may be imputed to Respondents (*see Seif v City of New York*, 218 AD2d 595, 596 [1st Dept 1995]; *Pavone v City of New York*, 170 AD2d 493, 493-494 [2d Dept 1991]). Most significantly, although Petitioner relies on purported reports of the Incident created by the DOC, Petitioner fails to annex any such reports to her Petition.

Prejudice

In *Matter of Newcomb v Middle County Cent. Sch. Dist.*, the Court of Appeals clarified

the burden of proof regarding substantial prejudice which a court must consider in determining whether to extend the time for a petitioner to serve a Notice of Claim. The Court held "that the burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice" (28 NY3d at 466). "Once this initial showing has been made, the public corporation must respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed" (*Id.* at 467). "The rule [the court] endorse[s] today-requiring a petitioner to make an initial showing that the public corporation will not be substantially prejudiced and then requiring the public corporation to rebut that showing with particularized evidence-strikes a fair balance" (*Id.*).

Here, Petitioner has failed to present "some evidence or plausible argument" supporting her argument that Respondents were not substantially prejudiced by the subject delay (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 466). The basis of Petitioner's claim that Respondents would not be prejudiced by a late Notice of Claim is Respondents' purported actual knowledge of the facts. As discussed above, Petitioner failed to establish that Respondents had actual notice of the essential elements constituting the claim. As such, Petitioner's assertions that there is no prejudice to Respondents in light of Respondents' actual knowledge is conclusory and without more fails to satisfy Petitioner's minimal burden (*see Matter of Maldonado v City of New York*, 152 AD3d 522, 523 [2d Dept 2017]. Given that Petitioner has failed to satisfy her burden to present "some evidence or plausible argument" to support a finding of lack of substantial prejudice to Respondents, the burden does not shift to

Respondents to make a particularized evidentiary showing that they would be substantially prejudiced if a late notice of claim is allowed (*see Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 466; *Matter of Cruz v Transdev Servs., Inc.*, 160 AD3d 729, 731 [2d Dept 2018]).

CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the Petition of Petitioner Madeline Perez pursuant to General Municipal Law § 50-e (5) for leave to serve a late Notice of Claim on Respondents Bellevue Hospital and N.Y.C. Health and Hospitals Corporation, or for an Order deeming the Notice of Claim attached to the instant Petition as timely served *nunc pro tunc*, is denied and the proceeding is dismissed..

. The Clerk shall enter judgment accordingly.

Dated: December 24, 2018

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.